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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

E. C. DOTHARD, *et al.*,

Appellants,

—v.—

BRENDA M. MIETH, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

MOTION OF AMERICAN CIVIL LIBERTIES UNION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE*

RUTH BADER GINSBURG
MAJORIE MAZEN SMITH
KATHLEEN WILLERT PERATIS
JOEL GORA
SUSAN DELLER ROSS
American Civil Liberties
Union Foundation
22 East 40th Street
New York, New York 10016

Attorneys for Amicus Curiae

RECORD PRESS, INC., 95 MORTON ST., NEW YORK, N. Y. 10014—(212) 243-5775
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ARGUMENT:

THE BONA FIDE OCCUPATIONAL QUALIFICATION(BFOQ) EXCEPTION TO TITLE VII DOES NOT JUSTIFY BARRING ALL WOMEN, IRRESPECTIVE OF INDIVIDUAL CAPABILITIES, FROM EMPLOYMENT AS CORRECTIONAL OFFICERS IN MALE MAXIMUM SECURITY PRISONS. ANY BFOQ APPLICATION IN THIS CASE SHOULD BE NARROWLY CONFINED FOR A BROAD READING OF THE BFOQ WOULD SIGNIFICANTLY UNDERMINE THE PURPOSE OF TITLE VII'S BAN ON SEX DISCRIMINATION IN EMPLOYMENT, AND WOULD CAST A

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MOTION OF AMERICAN CIVIL LIBERTIES UNION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Amicus respectfully moves, pursuant to Rule 42 of this Court's Rules, for leave to file the within brief amicus curiae. Counsel for the appellees have consented to the filing of this brief; counsel for the appellants have refused consent.

The American Civil Liberties Union is a nationwide, nonpartisan organization of over 250,000 members dedicated to defending the right of all persons to equal treatment under the law.

Recognizing that confinement of women's opportunities is a pervasive problem at all levels of society, the American Civil Liberties Union Foundation has established a Women's Rights Project to work toward the elimination of gender-based discrimination.

The American Civil Liberties Union believes that this case, concerning the scope of 42 U.S.C. §2000e-2, the bona fide occupational qualification exception as to sex in Title VII of the Civil Rights Act of 1964, presents an issue significant to the achievement of full equality between the sexes.

Lawyers associated with the American Civil Liberties Union presented the appeal in Reed v. Reed, 404 U.S. 71 (1971), participated as counsel for the appellants and later as amicus curiae in Frontiero v. Richardson, 411 U.S. 677 (1973), represented the appellant in Kahn v. Shevin, 416 U.S. 351 (1974), the appellees in Edwards v. Healy, 421 U.S. 772 (1975), Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), and Mathews v. Goldfarb, 396 F. Supp. 308 (E.D.N.Y. 1975), prob. jur. noted, 44 U.S.L.W. 3470 (February 24, 1976) (No. 75-699), and the petitioners in Struck v. Secretary of Defense, cert. granted, 409 U.S. 947, judgment vacated, 409 U.S. 1071 (1972), and Turner v. Department of Employment Security, 423 U.S. 44 (1975), and acted as counsel for petitioners, appellants and appellees, and as amicus curiae in this Court in several other gender discrimination and women's rights cases.

The purpose of this brief is to argue that the bona fide occupational qualification exception to Title VII is a narrow one which does not justify a blanket refusal to employ women as correctional officers in male maximum security prisons. Appellants did not prove below that it was necessary to be a male to work as a guard in Alabama's male penitentiaries. At the same time, current deplorable conditions in those penitentiaries, see Pugh v. Locke, 406 F. Supp. 318 (M.D.Ala. 1976), make this case more difficult than other BFOQ cases which have been decided by the lower federal courts. If the Court determines that because of these conditions, the lower court's decision should not be implemented until Alabama's prisons meet minimum constitutional standards, amicus urges that any BFOQ application in this case be narrowly confined to avoid encouraging a flood of attempts to revive BFOQ defenses which have properly been dismissed by the lower federal courts.

MARJORIE MAZEN SMITH

American Civil Liberties
Union Foundation
22 East 40th Street
New York, New York 10016
Attorney for Movant

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BRIEF OF AMERICAN CIVIL LIBERTIES UNION

AMICUS CURIAE

Interest of Amicus

The interest of amicus appears in the foregoing motion.

Opinion Below

The opinion of the three-judge district court for the Middle District of Alabama is reported at 418 F. Supp. 1169 (1976) and is set out in the Jurisdictional Statement at Appendix A at 14-47.

Statute Involved

Section 703(a) and (e) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-2(a) (1974) (hereinafter "Title VII"), in pertinent part provide:

> Sec. 703(a) It shall be an unlawful employment practice for an employer--
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's...sex...; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's...sex...
>
> Section 703(e): Notwithstanding any other provision of this title, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees on the basis of sex.. in those certain instance where..sex ...is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business

enterprise.

Question Presented *

Whether the bona fide occupational qualification exception as to sex in Title VII justifies the blanket refusal to employ women, irrespective of individual capabilities, as correctional officers in "contact" positions in Alabama's male maximum security prisons.

Statement of the Case

Amicus incorporates the Statement of the Case set out in Brief for Appellees.

Summary of Argument

The legislative history of Section (703(e), the "bona fide occupational qualification" exception to Title VII's ban on sex-based hiring, indicates that it is to be construed narrowly. EEOC Guidelines on Sex as a BFOQ also call for a narrow reading of the exception, and suffer from none of the infirmities which the Court found in General Electric Co. v. Gilbert, 45 U.S.L.W. 4031(December 7,]976).

* Although this case also presents the question whether height and weight requirements which impact more heavily on women violate Sec. 703(a), amicus will address only the BFOQ issue.

Evidence in the record of this case and a large and growing body of expert opinion on prison administration support the proposition that qualified women can work successfully as line correctional officers in male prisons, including those which house maximum security inmates. Moreover, there are significant penological advantages to integrating male and female correctional staff. Of course, prison administrators retain the right to require women applicants to demonstrate their individual suitability for the demanding work of a prison guard, and to dismiss those individuals who are hired but fail to perform adequately. The valid privacy interest of male prison inmates can be accommodated by selective work assignments among correctional officers rather than by refusing women employment altogether.

As a general matter, the inherent dangers of work as a prison guard do not justify barring women from the job. And no evidence credited by the district court proves that even the abysmal conditions found by the court in Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976), render Alabama's penitentiaries less safe for female guards. However, if in this Court's view, the chaos in these prisons warrants a special approach for these circumstances, the case should be remanded to the district court with instructions to retain jurisdiction until these institutions achieve minimum constitutional standards.

While it would be ironic if Alabama were to succeed in its claim that sex is a BFOQ for working in its male penitentiaries precisely because it has allowed conditions there to become so intolerable, it would be tragic if an unnecessarily broad opinion by the court in this case vitiated the gains women have won in the lower federal courts in more typical BFOQ cases. These decisions have rejected the contentions that assumed or actual differentials in average physical capabilities of the sexes may be made the basis for occupational disqualification in generic terms, or that the preferences or prejudices of customers can validate sex discrimination (absent interference with the company's primary function). The courts have rejected these BFOQ claims because to credit them would allow the §703(e) exception to swallow the §703(a) rule. If the BFOQ door is opened wider than the crack which may be warranted by the unique circumstances of this case, it will surely encourage a flood of ultimately unsuccessful attempts to relitigate issues long since correctly decided by the lower federal courts.

ARGUMENT

THE BONA FIDE OCCUPATIONAL QUALIFICATION (BFOQ) EXCEPTION TO TITLE VII DOES NOT JUSTIFY BARRING ALL WOMEN, IRRESPECTIVE OF INDIVIDUAL CAPABILITIES, FROM EMPLOYMENT AS CORRECTIONAL OFFICERS IN MALE MAXIMUM SECURITY PRISONS. ANY BFOQ APPLICATION IN THIS CASE SHOULD BE NARROWLY CONFINED, FOR A BROAD READING OF THE BFOQ WOULD SIGNIFICANTLY UNDERMINE THE PURPOSE OF TITLE VII'S BAN ON SEX DISCRIMINATION IN EMPLOYMENT, AND WOULD CAST A SHADOW UPON A LARGE BODY OF WELL-REASONED PRECEDENT.

A. The Legislative History of the Bona Fide Occupational Qualification Exception and the EEOC Guidelines on Sex as a BFOQ Require that the Exception Be Construed Narrowly.

Under Title VII, the only statutory defense to an explicit sex classification prohibited by Section 703(a) is that provided by Section 703(e):

> Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees ... on the basis of sex ... in those certain instances where ... sex ... is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise....

When the BFOQ exception was initially considered by the House, it applied only to discrimination based on religion and national origin. The House Judiciary Committee Report on Title VII, which was written prior to the amendment of the BFOQ section to include sex, treats the BFOQ as to religion and national origin very restrictively:

> Section 703(e) provides for a very limited exception to the provisions of the title. Notwithstanding any other provisions, it shall not be an unlawful employment practice for an employer to employ persons of a particular religion or national origin in those rare situations where religion or national origin is a bona fide occupational qualification.

H.R. Rep. No. 914, 88th Cong., 1st Sess. 27 (1963). While this report does not specifically address the sex exception, the House Judiciary Committee's statement is probably the most reliable of the available legislative sources on the intended scope of the BFOQ concept generally.* See E. Crawford, The Con-

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* Indications of Congressional intent in enacting the BFOQ exception as to sex are scanty. There was neither a committee report or hearing record in the Senate on the Civil Rights Act, nor was there a Senate-House conference report. While there was some discussion of the BFOQ exception on the floor of the House, such debates are "generally entitled to little weight" in

struction of Statutes §§213-16 at 375-86 (1940). The sex exception was added to the House bill following a colloquy between Representatives Goodell and Bolton. An offhand example, indicating a privacy concern, was cited: "an elderly woman who wants a female nurse." 110 Cong. Rec. 2718 (1964). (Nothing was said of the male patient/female nurse or female patient/male doctor employment situation.)

(FN Cont.)

> discerning legislative intent, absent clear indications that the speakers are well informed and represent the views of their colleagues. 2A Sands, Sutherland Statutory Construction §48.13 at 217 (4th Ed. 1972). Applying this principle to the BFOQ exception, remarks made on the House floor are of minimal value. During the debate, a number of Congressmen were sufficiently confused to include race as one type of discrimination permissible on BFOQ grounds. 110 Cong. Rec. 2554-55(1964).

Not only does the most reliable legislative history source, the House Judiciary Committee report,* call for narrow reading of BFOQ exceptions, but a well-accepted canon of statutory construction points securely in the same direction: the BFOQ provision must be construed narrowly since it is an exception to a broadly remedial civil rights statute. Crawford, supra, §299 at 610.

Added reason for narrowly construing the BFOQ exception is provided by the grave concern about equal employment opportunities for women expressed by Congress in 1972, when it passed an amendment to Title VII, the Equal

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* But cf. the interpretive memorandum offered in the Senate by floor managers Clark and Case; according to the memorandum, the BFOQ exception creates:

> a limited right to discriminate on the basis of religion, sex or national origin where the reason for the discrimination is a bona fide occupational qualification. Examples of such legitimate discrimination would be the preference of a French restaurant for a French cook, the preference of a professional baseball team for male players, and the preference of a business which seeks the patronage of members of particular religious groups for a salesman of that religion.

110 Cong. Rec. 7213 (1964).

Employment Opportunity Act. In explaining why the amendment was needed, the House Committee on Education and Labor wrote:

> The situation of the working women is no less serious (than that of minorities)....
>
> Women are subject to economic deprivation as a class. Their self-fulfillment and development is frustrated because of their sex. Numerous studies have shown that women are placed in the less challenging, the less responsible and the less remunerative positions on the basis of their sex alone.
>
> Such blatantly disparate treatment is particularly objectionable in view of the fact that Title VII has specifically prohibited sex discrimination since its enactment in 1964.
>
> ...
>
> In recent years, the courts have done much to create a body of law clearly disapproving of sex discrimination in employment. Despite the efforts of the courts and the Commission, discrimination against women continues to be widespread, and is regarded by many as either morally or physiologically justifiable.
>
> This Committee believes that women's rights are not judicial divertissements. Discrimination against women is no less serious than other forms of prohibited employment practices

> and is to be accorded the same degree of social concern given to any type of unlawful discrimination.

H.R. Rep. No. 92-238, 92nd Cong., 1st Sess. 4-5 (1971). See also S. Rep. No. 92-415, 92nd Cong., 1st Sess. 7-8 (1971).

Congress left it to the EEOC to articulate with specificity the scope of the BFOQ exception; the Commission has consistently, since 1965, taken the position that the exception "should be interpreted narrowly." 30 Fed. Reg. 14927 (Dec. 2, 1965); 29 C.F.R. §1604.2. The Commission states that it will find a BFOQ exception warranted "where it is necessary for the purpose of authenticity or genuineness...e.g., an actor or actress," and not warranted in the following situations:

> (i) The refusal to hire a woman because of her sex based on assumptions of the comparative employment characteristics of women in general. For example, the assumption that the turnover rate among women is higher than among men.
>
> (ii) The refusal to hire an individual based on stereotyped characterizations of the sexes. Such stereotypes include, for example, that men are less capable of assembling intricate equipment; that women are less capable of aggressive salesmanship. The principle of nondiscrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group.

> (iii) The refusal to hire an individual because of the preferences of coworkers, the employer, clients or customers....

As this Court recently held, General Electric Co. v. Gilbert, supra, 45 U.S. L.W. at 4035-36, interpretative rulings such as the EEOC guidelines

> while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

None of the factors which the Court found prevented deference to the EEOC Guideline on pregnancy in Gilbert exist in this case. The Commission's position on the BFOQ exception as to sex was issued virtually contemporaneously with Title VII on December 2, 1965. The guidelines do not contradict any position taken by the Commission either before or after its issuance. Nor are there other indicia of the proper interpretation of the BFOQ which conflict with these guidelines.

Finally, the EEOC Guidelines on the BFOQ are a well-reasoned position which effectively implements Congressional intent. As recognized by numerous commentators, only if the BFOQ is narrowly interpreted can "Title VII's central message--that artificial, arbitrary, and unnecessary barriers to employment which are wrongly discriminatory must be eliminated--" be made a reality. Oldham, Questions of Exclusion and Exception under Title VII, 23 Hastings L.J. 55, 93 (1971). "If the exception is used simply to confirm the culturally accepted standards of what work a woman or man should be doing, the prohibition against discrimination on the basis of sex will be rendered meaningless." Cooksey, The Role of Law in Equal Employment Opportunity, 7 B.C. Ind. & Comm. L. R. 417, 429 (1965). See also Note, Developments in the Law--Employment Discrimination and Title VII, 84 Harv. L. Rev. 1109, 1179 (1971) ("The broad sweep of affirmative obligation on employers not to discriminate ought not to be diluted by a reading of the exception that invites the very sex-based judgment attacked by the statute's main policy"). At the same time, the EEOC interpretation of the BFOQ recognizes that there are situations where the intrinsic attributes of one sex or the other are a necessary qualification for the job.

B. The BFOQ Exception Does Not Justify Barring All Women, Irrespective of Individual Capabilities, From Employment as Correctional Officers in Male Maximum Security Prisons.

Where a facial exclusion on the basis of sex is challenged, the burden of proof is on the employer to demonstrate that the position in question falls within the BFOQ exception. E.g., Weeks v. Southern Bell Tel. & Tel. Co., 408 F. 2d 228 (5th Cir. 1969). Tacitly acknowledging this,* appellants tender argument that women are generically unfit to serve as guards in male maximum security prisons.

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* Throughout the proceedings below, and in its jurisdictional statement, appellants recognized that Regulation 204 involved facial sex discrimination, which could only be justified if sex was a BFOQ. Appellants now claim, however, that "Regulation 204 is facially neutral (as it) applies equally to both sexes"; "(t)he only gender based effect of the Regulation lies in the fact that there are more male prisoners than female in Alabama (and) (t)herefore, a disproportionate impact is suffered by women guards." Brief of Appellants at 48.

This new position flies in the face of the plain words of Section 703(a) of the Civil Rights Act as well as this Court's decision in Phillips v. Martin Marietta, 400 U.S. 542 (1971);

Appellants assert that "in an all male maximum security prison, the disruptive influence caused by a female guard in close contact with the inmates should be a matter of innate recognition." Brief of Appellants at 50-51. What appellants "innately recognize" is contradicted by record evidence in the case at bar, and by a large and growing body of expert opinion on prison administration. For example, the Federal Bureau of Prisons is committed to integrating both sexes into all its institutions, including its maximum security prisons, in order to promote "the goal of normalization as part of improving the correctional facilities."

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*(FN Cont.)

"Section 703(a) of the Civil Rights Act of 1964 requires that persons of like qualifications be given employment opportunities irrespective of their sex" (emphasis added). In cases where men or women are denied employment on ground grounds of their sex, the issue is not whether the resulting employment opportunities are equal in number but whether the sex-based decision is justified under §703(e). Thus, in Phillips the Court examined only the exclusion, not the employer's overall employment of women, which was high (see Phillips v. Martin Marietta Corp., 411 F. 2d 1,2 (5th Cir. 1969), rev'd, Phillips, supra, pointing out that 75 to 80% of the persons holding the position at issue were women).

Federal Prison System, Policy Statement No. 3713.7, January 7, 1976, J.S. at 44-45. Similarly, an eminent authority on penology urges staffing a model prison for "repetitively violent (male) criminals" with 40 to 50% women:

> That the injection of women into the prison at all levels, including that of front-of-the-line guard, will tend to reduce violence is offered as a confident proposition .... As a matter of observation, men behave better in the presence of women. The social skills of many male offenders in dealing with women are distorted and undeveloped. Frequent and constructive association with women as staff members of the prison will have a positive impact upon the prisoners' later social relationships.

Norval Morris, The Future of Imprisonment, 108-109 (1974).

A survey in the early 1970's reported that correctional administrators were beginning to find significant benefits to sexual integration of staffs at both male and female prisons:

> Women's prisons have traditionally had some staff integration, with male correctional officers assigned for security reasons. Because of the stereotype of male prisoners as more dangerous, however, female correctional officers were rarely assigned to male institutions. Recently, the

> administrators of several female institutions have come to see male staff as beneficial for reasons other than security: There is a feeling that the institutional atmosphere is more "natural" when members of both sexes are present as correctional officials. Some male institutions are also beginning to realize the advantages of sexually-mixed staffs, although they are generally still far behind in the process of integration.

Note, The Sexual Segregation of American Prisons, 82 Yale L.J. 1229, 1241 (1973).

In 1973, the National Advisory Commission on Criminal Justice Standards and Goals stated:

> The time is long overdue for a careful inspection of the assumptions and biases that have barred women from most positions in corrections ... There appears to be no good reason why women should not be hired for any type of position in corrections.

National Advisory Commission, A National Strategy to Reduce Crime 125, 476 (1973).*

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* The Commission noted that discrimination in hiring and promotion of women throughout corrections, particularly in male institutions, had effectively eliminated women from management positions except in the few institutions for females. Id at 125. The EEOC reported in 1973 that 11.1% of correctional administrator positions on the

See also Law Enforcement Assistance Administration, Report of the LEAA Task Force on Women 14 (1975) (systematic exclusion of women from many correctional jobs is based on "irrational and outdated sex role stereotyping").

In 1974 California began hiring women to work in contact positions in male prisons. The Deputy Director of the California Department of Corrections reported one year later:

> Generally, female officers are functioning successfully in male institutions. Qualified, highly motivated women are being recruited, and experience has shown that women do apply for these positions. A captain who ten months ago felt that women had a limited place in corrections, now, after supervising women custodial personnel who perform all officer post assignments, states, "They have been accepted by male personnel and inmates and their individual potential for growth appears to be at approximately the same ratio as for a comparable group of male officers."

Becker, Women in Corrections: A Process of Change, 4 Resolution 19 (Summer, 1975). See also Ibrahim, Deviant Sexual Behavior

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(*FN Cont.)
state and local level were held by women, and only 9.2% of correctional protective service positions. EEOC, Minorities and Women in State and Local Government 1973, Vol. 1 at 111 (1973).

in Men's Prisons, 20 Crime & Delinquency 38, 44(1974) (increased employment of women in prisons suggested as one means of changing prison social structure to reduce abnormal sexual behavior among prisoners); Ward, Impact of Female Employees in Adult All-Male Correctional Institutions, 5 Crime & Delinquency Lit. 90 (1973); Scacco, Some Observations About Women and Their Role in the Field of Corrections, 34 Amer. J. of Corr. 10-12 (1972); Ruback, The Sexually Integrated Prison, 3 Am. J. Crim. Law 301, 323-24 (1975).

Appellants also attempt to support their BFOQ claim by contending that in high-security prisons there is "special danger to a female." Brief of Appellants at 50. The argument that sex is a BFOQ whenever performance of the duties of a job sought by a woman entails a risk of danger to her physical safety has been firmly rejected. As the Fifth Circuit pointed out in Weeks, supra, 408 F. 2d at 236, Title VII "vests individual women with the power to decide whether or not to take on unromantic tasks." In Cheatwood v. South Central Bell Tel. & Tel. Co., 303 F. Supp. 754, 758 (M.D. Ala. 1969), where the employer contended that the duties of commercial representative would subject a female employee to harassment and danger because she would have to make collections in bars, poolrooms and other locations, the court responded:

> Again, however, there is nothing in the record to indicate that these features of the position are functionally related to sex. They mean nothing more than that some women, and some men, might not wish to perform such tasks. Here, however, the record is clear that one obtains this position by bidding for it ....

Or, as California's highest court has declared:

> The desire to protect women from the general hazards inherent in many occupations cannot be a valid ground for excluding them from those occupations.... Women must be permitted to take their chances along with men when they are otherwise qualified and capable of meeting the requirements of their employment. (See Kanowitz, Women and The Law (1969) pp. 33-34.) We can no more justify denial of the means of earning a livelihood on such a basis than we could deny all women drivers' licenses to protect them from the risk of injury by drunk drivers. Such tender and chivalrous concern for the well-being of the female half of the adult population cannot be translated into legal restrictions on employment opportunities for women. (Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 9-10, 485 P. 2d 529, 534 (1971).

Of course, this does not mean that all women who apply for the job must be given it. Prison administrators may require women applicants to demonstrate

their individual suitability for the demanding work of a prison guard.* As Dean Morris points out:

> (I)t need hardly be noted that front-line work in a (male) maximum security prison is not the kind of work that will be attractive to a majority of women (or men, for that matter) or for which a majority will be suited. Women recruits will need to be made sensitive to the problems of sexual anxieties that are noticeable in many individuals who have been incarcerated for a long period of time. Fears of sexual inadequacy and hence of sexual readjustment upon release are substantial in prison. Not only younger women should be recruited; the work is suitable for more mature women also and mothers and other women coming back into the work force should be included.

Morris, supra at 109.

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* The Court below noted that one of appellants' witnesses based his opinion as to the unsuitability of women as correction officers in large measure upon the poor performance of one female officer under his supervision. As the Court correctly observed, "if a woman cannot or does not perform her assigned duties, she may be suspended or removed permanently from her job.... This is no reason, however, that all women cannot adequately perform." J.S. at 43.

Alabama argues before this Court, but simply did not prove to the district court, that because "guards are an extreme minority in a prison" and are required to "use ...psychological methods as a first defense," all women must be barred from employment in male maximum security prisons. Brief of Appellants at 51. Appellees' experts, experienced correctional administrators, provided ample support for the district court's conclusion that the ability to cope with male prisoners was not a function of sex:

> Q. What qualities do you think a guard should possess in order to cope with the job's element of danger?
>
> A. Common sense, fairness, stability, mental and emotional.
>
> Q. Do you think this ability to cope is dependent on the guard's sex?
>
> A. No, it is not.
>
> Q. Do you think it's dependent on physical strength?
>
> A. None. There is no way physical strength could help you in a situation like that.

Deposition of C. Robert Sarver, App. at 81-82.

* * *

> Q. Relatively speaking, how important, in your opinion, is

physical strength versus emotional and psychological fitness?

A. Well, physical strength is only utilized at a time of confrontation, and ability to deal with tact and diplomacy and competency is called upon almost at all times, so if you were going to weigh the two...I would say I would put a greater value on the ability to deal effectively with inmates than their physical strength.

Q. In your opinion, is the ability to cope with the job's elements of danger dependent upon the officers' sex? In other words, if you had two Correctional Officers and you knew nothing else about either of them except their sex, could you say, on the basis of sex alone, which one would be able to cope better with the elements of danger?

A. No, I could not, on those limited factors.

Q. Could you say, on the basis of the officers' sex, which one would be better able to maintain security and order?

A. No, I could not.

Deposition of William Nelson, App. at 190-191.

Although the court below properly refused to accept appellants' unsubstantiated assertions that women were

inherently unsuited for the job or that the job's dangers precluded employing any women, it did take proper account of the privacy interest of the male inmates. This interest, however, was viewed in the context of the prison environment where little "privacy" is accorded to inmates.*

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* Of course, the court recognized the inconsistency of the state's position since it permitted women to work in male youth correctional facilities and to patrol on those premises communal toilet and shower facilities similar to those in the large penitentiaries. J.S. at 43. Moreover, one of respondents' witnesses stated:

> It strikes me as funny that the Alabama Prison System is at all concerned with the rights of privacy of the inmates. It never has been before. In my opinion, it doesn't make a bit of difference whether that privacy is being invaded by a male or a female.... Alabama prisoners don't have any privacy now. Even in isolation there are as many as four or five people in a cell.

Deposition of C. Robert Sarver, App. at 84,89. Other authorities have suggested that "the concepts of privacy and prison are antithetical beyond comprehension. The prison is, almost by definition, a place where the resident has lost his privacy, and his identity, and has become a number." Singer, Privacy, Autonomy, and Dignity in the Prison: A Preliminary Inquiry Concerning Constitutional Aspects of the Degredation Process in Our Prisons, 21 Buff. L. Rev. 669(1972). See also Doe v. Duter, 407 F. Supp. 922 (W.D. Wis. 1976).

Thus, the district court concluded that the strip search function could be restricted on the basis of sex in order to avoid unduly invading the inmates' privacy. This restriction, however, did not amount to a BFOQ for all guard jobs. The district court said (J.S. at 45):

> This tension between the individual's right to employment without regard to his or her sex and the inmates' right to privacy can be resolved by selective work responsibilities among correctional officers rather than by selective job classifications.... Only a small percentage of the correctional counselor work force is involved in conducting systematic strip searches.

The district court's careful treatment of the BFOQ exception is consistent with Congressional intent and scholarly opinion, for it is clear that the individual's interest in bodily privacy merits weight in the balance. That interest would even rise to the level of a BFOQ when it is centrally involved in the work situation.* For example, the BFOQ exception is considered applicable to the position of a restroom or locker room

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* Moreover, the Equal Rights Amendment was passed by Congress with the understanding that the bodily privacy interest would permit a separation of the sexes with respect to such places as public toilets. S. Rep. No. 92-689, 92d Cong., 2d Sess. (1972).

attendant (who actually provides personal services for persons inside the restroom). Landau, Arbitration and Women's Employment, 23 Hastings L.J. 95, 127 (1971). As a widely cited commentary explains:

> (Although) analytically similar to consumer preferences which are forbidden by the Act, (strongly held taboos in the sexual privacy area) may be less objectionable since their net effect does not foreclose a significant portion or the job market to either sex. Moreover, operation of these taboos does not brand one sex or the other as incompetent to perform the job. Rather, it posits that the mere presence of a member of the wrong sex would be too disruptive.
>
> ...
>
> (However), because of the heavy presumption against allowing one sex to monopolize an occupation whose duties can be performed by members of either sex, employers should be required, wherever possible, to separate the functions for which sex is essential from those for which sex is non-essential, and to hire on a nondiscriminatory basis for the latter.

Developments, supra 84 Harv. L. Rev. at 1183, 1186.

California's experience illustrates the viability of the accommodation outlined by the district court:

The policy in California is that, under ordinary circumstances, female officers will not skin-search inmates; in an emergency situation, however, any officer might be expected to perform this function. (A similar policy has been used successfully at the two all female facilities with male employees for several years.) Female officers routinely pat-search inmates as their post orders dictate. In showering, some minor alterations have been made. Some institutions use modesty screening, which allows visibility of only the upper portions of the body,and one facility has fogged the windows looking into the shower area so that just outlines of figures can be seen.... Interestingly, most male staff now feel that giving the inmates some privacy is important and humane even when only male staff are present.

Becker, supra, 4 Resolution at 2-3.

C. Any BFOQ Application in this Case Must be Narrowly Confined to Avoid Undermining the Central Thrust of Title VII.

Ironically, the dismal conditions of Alabama's penitentiaries afford Alabama its most convincing argument on the BFOQ issue. These conditions led District Judge Johnson to rule in Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976), that Alabama's penitentiaries violated the Eighth Amendment rights of the inmates they housed. Thus, counsel for appellants repeatedly asked appellees' expert wit-

nesses whether they would approve the employment of women guards under the following circumstances (all of which had been found to exist by the Court in Pugh):

> Where the institution is horrendously overcrowded.... In a dormitory type situation where the bunks in the dormitories are often packed together so closely that there is no walking space between them and sanitation and security are impossible to maintain.... Where the (sic) appreciable percentage of inmates are suffering from some mental disorder and the mentally disturbed are dispersed throughout the prison population without receiving treatment and the makeup of this population is ten percent psychotic and another sixty percent are disturbed enough to require treatment.... Where violent inmates are not isolated from those who are young or passive or weak.... Where ... extortion, theft and assaults are everyday occurrences among the general inmate popultion.... Where there is an extremely high inmate-to-staff ratio which makes personal interaction between the two, inmates and staff, virtually impossible because staff members must spend all their time attempting to maintain control or protecting themselves.... Where ...violence is rampant and there is a jungle atmosphere.... Where most prisoners carry some form of homemade or contraband weapon.... Where there are too few guards to prevent outbreaks of violence or even stop those which occur....

App. at 194-195.

As appellees' expert noted, a prison system having these characteristics is, to say the least, "obviously a very abnormal environment for human beings to be placed in." Deposition of Raymond Nelson, App. at 197. At the same time, he granted, he would be hesitant to introduce women guards into a setting "as grossly abnormal as you have described." App. at 197. Alabama's Commissioner of Correction, who characterized the atmosphere of the state's prisons as "dangerous to the guards," conceded that upon implementation of the district court order in Pugh, which called for a reduction in inmate population of almost 50%, an increase in personnel of over 80% and classification of inmates, "a lot of tension will be eliminated" and "the danger (to guards) will be considerably reduced." App. at 120-121.

No evidence credited by the district court proves that these conditions render the prisons less safe for female guards than for male guards. However, if in this Court's view, the severe chaos and danger in Alabama's male maximum security prisons warrants the conclusion that sex is a BFOQ, amicus urges the Court to remand the case to the district court with instructions to retain jurisdiction until Alabama brings these institutions up to minimum constitutional standards. See Wolff v. McDonnell, 418 U.S. 539, 571-72 (1974); Doe v. Duter, supra, 407 F. Supp. at 925.

While it would be ironic if Alabama were to succeed in its claim that sex is a BFOQ for working in its male penitentiaries precisely because it has allowed

conditions in those institutions to sink to such an abysmal level, it would be tragic if an unnecessarily broad opinion in this case vitiates many of the gains women have won by virtue of lower court decisions in more typical BFOQ cases.

Never interpreted by this Court,* the BFOQ sex exception is the subject of a considerable body of lower federal court decisions.** Although the precise form-

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* In Phillips v. Martin-Marietta Corp., 400 U.S. 542 (1971), the issue was whether it was a violation of section 703(a) for the company to refuse to hire women with pre-school age children while employing men similarly situated. The question whether such family obligations could constitute a BFOQ was never reached by the Court.

** As late as 1975, a leading text noted:

> Minority workers have now moved beyond the stage of attacking policies which are discriminatory on their face... to raising the disparate impact argument, or challenging apparently evenhanded policies as giving present-day effect to past discrimination without business necessity.... Women workers, on the other hand, still face open job segregation and other overt discriminatory practices, because employers and unions have not yet generally accepted the fact that sex discrimination is illegal.

Babcock, Freedman, Norton, & Ross, Sex Discrimination and the Law 230 (1975).

mulations have varied, these decisions have uniformly confined the BFOQ exception to a narrow ambit. See, e.g., Ridinger v. General Motors Corp., 325 F. Supp. 1089 (S.D. Ohio) rev'd on other grounds, 474 F. 2d 949 (6th Cir. 1971); LeBlanc v. Southern Tel. & Tel. Co., 333 F. Supp. 602 (E. La. 1971), aff'd, 460 F. 2d 1228 (5th Cir.), cert. denied, 409 U.S. 990 (1972). Witt v. Sec. of Labor, 397 F. Supp. 673 (D. Me. 1975); Tracy v. Oklahoma Dept. Corr., 8 EPD ¶9713 (D. Okla. 1974); Wilson v. Sibley Memorial Hosp., 340 F. Supp. 686 (D.D.C. 1972), rev'd & rem'd on other grounds, 488 F. 2d 1338 (D.C. Cir. 1973).

The uniform approach to the BFOQ defense is attributable to the common themes in employers' attempts to invoke the exception, and the commitment of

courts to insure that the exception does not swallow the rule. The common themes have been stereotypical views of the physical capabilities of women and the assertions of customer preference. For example, in ruling that the "arduous nature of work-related activity (did not) render women physically unsuited for the jobs" and that women must be permitted to compete for the position of agent-telegrapher, the Ninth Circuit declared:

> Based on the legislative intent and on the Commissioner's interpretation, sexual characteristics, rather than characteristics that might, in one degree or another correlate with a particular sex, must be the basis for the application of the BFOQ exception....
>
> The premise of Title VII, the wisdom of which is not in question here, is that women are now to be on equal footing with men. Weeks v. Southern Bell Tel. & Tel. Co., 408 F. 2d 228, 236 (5th Cir. 1969). The footing is not equal if a male employee may be appointed to a particular position on a showing that he is physically qualified, but a female employee is denied an opportunity to demonstrate personal physical qualification. Equality of footing is established only if employees otherwise entitled to the position, whether male or female, are excluded only upon

> a showing of individual incapacity. See Bowe v. Colgate-Palmolive Co., 416 F. 2d 711, 718 (7th Cir. 1969). This alone accords with the Congressional purpose to eliminate subjective assumptions and traditional stereotyped conceptions regarding the physical ability of women to do particular work.

Rosenfeld v. Southern Pacific Co., 444 F. 2d 1219, 1225 (9th Cir. 1971).

The Seventh Circuit has likewise rejected the proposition that assumed or actual differentials in average physical capabilities and physical limitations of the sexes may be made the basis for occupational qualifications in generic terms. It held:

> Colgate may, if it so desires, retain its 35-pound weight-lifting limit as a general guideline for all of its employees, male and female. However, it must notify all of its workers that each of them who desires to do so will be afforded a reasonable opportunity to demonstrate his or her ability to perform more strenuous jobs on a regular basis.

Bowe v. Colgate-Palmolive Co., 416 F. 2d 711, 718 (7th Cir. 1969).

Another common claim has been that customer preference constitutes a BFOQ. In Diaz v. Pan American World Airways, 442 F. 2d 385, 389 (5th Cir.), cert. denied, 404 U.S. 950 (1971), the Fifth Circuit ruled that an airline could not

bar men from becoming flight cabin attendants despite trial court findings that passengers preferred service by female stewardesses:

> While we recognize that the public's expectation of finding one sex in a particular role may cause some initial difficulty, it would be totally anomalous if we were to allow the preference and prejudices of the customer to determine whether the sex discrimination was valid. Indeed, it was, to a large extent, these very prejudices the Act was meant to overcome. Thus, we feel that customer preference may be taken into account only when it is based on the company's inability to perform the primary function or service it offers.

If these defenses were credited, Title VII's ban on sex discrimination would be eviscerated. As the Diaz court said, in declaring that close scrutiny of the language of §703(e) compelled a narrow interpretation of the BFOQ exception:

> The sentence contains several restrictive adjectives and phrases: it applies only "in those certain instances" where they are "bona fide" qualifications "reasonably necessary" to the operation of that "particular" enterprise. The care with which Congress has chosen the words to emphasize the function and to limit the scope of the exception indicates that it had no intention of opening the kind of enormous gap in the law which would exist if an employer could

> legitimately discriminate against a group solely because his employees, customers, or clients discriminated against that group. Absent much more explicit language, such a broad exception should not be assumed for it would largely emasculate the act.
>
> The use of the word "necessary" in section 703(e) requires that we apply a business necessity test, not a business convenience test. That is to say, discrimination based on sex is valid only when the essence of the business operation would be undermined by not hiring members of one sex exclusively (emphasis in original).

Id. at 387-88.

This case is unique among cases presenting a BFOQ defense. No other BFOQ case has involved both a question of invading the bodily privacy of those who lack the freedom to choose whether to permit the invasion and the chaos and open violence of the Alabama prison system. In other BFOQ cases, there is no question about serious injury resulting to the woman worker which may prevent her from performing her job of protecting others. The concern instead is the "protective" one which seeks simply to keep women from difficult tasks out of a purported interest in women's welfare. This Title VII forbids.

In short, the issues involved in the usual BFOQ case* are the employers' "chivalrous" concern about the dangers of the job for which the woman applied, e.g., Rosenfeld v. Southern Pacific, supra, or a vicarious assertion of customer preference for employees of a particular sex, e.g., Diaz v. Pan American, supra, or a claim that the average woman or man would not be able to perform the required tasks, e.g., Bowe v. Colgate, supra -- not the more troubling issue presented in this case.

Because of the unique issue presented in this case, it is important that any credence accorded the BFOQ defense here not cast a cloud upon the uniform body of case law developed by lower federal courts restricting the BFOQ defense to a very narrow ambit. If the BFOQ door is opened wider than the crack needed to accommodate the rare situation, it will surely encourage a flood of ultimately unsuccessful attempts to relitigate issues long since settled in this highly sensitive area of employment discrimination law.

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* Cf. Note, supra, 23 Hasting L.J. at 86:

> Most of the contemporary cases presenting BFOQ questions fall into three areas: those dealing with protective laws, those raising problems of social mores or morality and those involving the preferences of consumers or co-workers.

Conclusion

For the reasons stated above, the decision of the United States District Court for the Middle District of Alabama should be affirmed, or in the alternative the case should be remanded to the District Court for reconsideration in light of Pugh v. Locke, supra.

Respectfully submitted,

RUTH BADER GINSBURG
MARJORIE MAZEN SMITH
KATHLEEN WILLERT PERATIS
JOEL GORA
SUSAN DELLER ROSS
American Civil Liberties Union Foundation
22 East 40th Street
New York, New York 10016

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